

Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making

David Klein
dek5b@virginia.edu

Neal Devins
William & Mary Law School, nedevi@wm.edu

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DICTA, SCHMICTA: THEORY VERSUS PRACTICE IN LOWER COURT DECISION MAKING

DAVID KLEIN* & NEAL DEVINS**

ABSTRACT

The distinction between dictum and holding is at once central to the American legal system and largely irrelevant. In the first systematic empirical study of lower court invocations of the distinction, we show that lower courts hardly ever refuse to follow a statement from a higher court because it is dictum. Specifically, federal courts of appeals meaningfully invoke the distinction in about 1 in 4000 cases; federal district courts in about 1 in 2000 cases; and state courts in about 1 in 4000 cases. In this Essay, we report these findings, describe our coding system, and offer a preliminary assessment of the implications of our study. Most notably, our findings raise questions about the vitality of traditional common law judging. Rather than play a significant role in the development of legal principles by treating extraneous statements in higher court rulings as nonbinding dicta, lower courts cede much of their common law power to higher courts. Higher courts can issue sweeping rulings that address questions not immediately before them, knowing that those statements will not be treated as dicta. In highlighting this dynamic between lower and higher courts, our study also casts light on the ongoing debate over judicial minimalism. The ability of courts to pursue the minimalist project of issuing narrow, fact-specific rulings is undercut by a regime in which lower courts look to higher courts

* Associate Professor of Politics, University of Virginia.

** Goodrich Professor of Law, Cabell Research Professor of Law & Professor of Government, College of William & Mary. Thanks to Mike Dorf, Tara Grove, Michael Herz, Dave Hoffman, Pauline Kim, Eric Posner, Max Stearns, and participants at a faculty workshop at Vanderbilt Law School for extremely helpful comments on an earlier draft of this Essay. Thanks also to our excellent research assistants, Thomas Gray and Derek McMahan.

for the enunciation of legal principles. Finally, our study is highly salient to the practice of law. Lawyers, although frequently referencing the holding-dictum distinction in legal briefs, have little reason to think that a lower court will ever invoke the distinction to rule against higher court dicta.

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INTRODUCTION

One of the spirited debates set off by the Supreme Court's health care decision¹ has nothing to do with the quality of the Justices' legal reasoning or what the policy consequences of the decision should be. Rather, it revolves around the question of whether Chief Justice Roberts's opinion should be considered "holding" or "dictum." Because the Affordable Care Act was ultimately upheld under the taxing power,² academics, practitioners, and the Justices themselves squared off on what precedential weight, if any, should be given to the Chief Justice's determination that Congress could not compel participation in the health insurance market under its commerce power.³ For Randy Barnett, who championed the Commerce Clause argument embraced by Roberts, the opinion was holding because Roberts claimed that he would not have even considered the taxing power argument if the statute were a permissible use of Congress's commerce power.⁴ For Jack Balkin, who vigorously defended the statute, the Roberts opinion was arguably dictum;⁵ for Justice Ginsburg it was not "outcome determinative" and therefore unnecessary.⁶

Why this debate? Because dictum and holding are usually thought to be entitled to very different weight in the American legal system, as in other common law systems: "A court's holding defines the scope of its power; holdings must be obeyed.... Dicta is the stuff that doesn't have to be obeyed."⁷ If Roberts's commerce power

1. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

2. *Id.* at 2608 (5-4 decision regarding the taxing power).

3. *Id.* at 2591 (5-4 decision regarding the commerce power).

4. Randy Barnett, Op-Ed., *We Lost on Healthcare. But the Constitution Won.*, WASH. POST (June 29, 2012), http://www.washingtonpost.com/opinions/randy-barnett-we-lost-on-health-care-but-the-constitution-won/2012/06/29/gJQAzJuJCW_story.html; see also Ilya Somin, *A Simple Solution to the Holding vs. Dictum Mess*, VOLOKH CONSPIRACY (July 2, 2012, 3:47 PM), <http://www.volokh.com/2012/07/02/a-simple-solution-to-the-holding-vs-dictum-mess>.

5. Jack Balkin, *Supreme Court Year in Review Entry 18: That Boring Old Tax Argument Was Always a Winner*, SLATE (June 28, 2012, 7:08 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/supreme_court_year_in_review/supreme_court_year_in_review_it_was_always_about_the_tax_.html.

6. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2629 n.12 (Ginsburg, J., concurring in part and dissenting in part).

7. David Post, *Commerce Clause "Holding v. Dictum Mess" Not So Simple*, VOLOKH

determination is a holding, then lower courts are bound to follow it in future cases; if it is dictum, their only obligation is to give his reasoning respectful consideration.

No doubt, the distinction between holding and dictum is central to the American legal system—in theory.⁸ But theory is one thing, practice another.⁹ The point of this Essay is to ask how much is really at stake in this debate over whether the Roberts opinion is dictum and, more generally, whether a court opinion can be labeled as holding or dictum. Our concern is not the normative question of how a court should act but the empirical question of how much the distinction matters for the impact of higher courts' language on lower courts' decisions.

This Essay speaks to the continuing vitality of the holding-dictum distinction through the first systematic study of how lower courts treat higher court dicta.¹⁰ As we will show, the gap between dicta-in-

CONSPIRACY (July 3, 2012, 8:17 AM), <http://www.volokh.com/2012/07/03/commerce-clause-holding-v-dictum-mess-not-so-simple/>. For a competing perspective, see Somin, *supra* note 4 (suggesting that the court deciding a case has the power to declare what is holding and what is dictum). For other commentary on this issue, see Gideon, *The Language About the Commerce Clause Was Non-Binding Dictum*, DAILY KOS (June 29, 2012, 6:57 AM), <http://www.dailycos.com/story/2012/06/29/1104308/-The-language-about-the-Commerce-Clause-was-non-binding-dictum>; William A. Jacobson, *What If That Huge Conservative Doctrinal Achievement Was Mere Dicta?*, LEGAL INSURRECTION (June 29, 2012, 4:36 PM), <http://legalinsurrection.com/2012/06/what-if-that-huge-conservative-doctrinal-achievement-was-mere-dicta/>; Warren Richey, *Questions About Chief Justice's Health-Care Ruling Could Have Lasting Impact*, CHRISTIAN SCI. MONITOR (July 3, 2012), <http://www.csmonitor.com/USA/Justice/2012/0703/Questions-about-chief-justice-s-health-care-ruling-could-have-lasting-impact>.

8. Most notably, the holding-dictum distinction reflects the common law precept that legal principles develop incrementally, with any one decision having only a limited impact. See generally Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1259-60 (2006). The Supreme Court has long recognized that statements that “go beyond the case ... may be respected, but ought not to control the judgment in a subsequent suit.” *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

9. Academic studies of the holding-dictum distinction have largely focused on the drawing of the line separating holding from dictum. See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005); Dorf, *supra* note 8; Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL EDUC. 431 (1989).

10. The holding-dictum distinction is also relevant to higher court consideration of its own precedent. We focus on the vertical relationship between higher and lower courts both because of the centrality of this dynamic to the future of common law judging, and because it is capable of empirical assessment. In Part III.A of this Essay, we detail the ways in which our findings speak to the vitality of common law judging. For a discussion of the difficulties of

theory and dicta-in-practice is strikingly large. Lower courts often mention the distinction between holding and dictum but hardly ever invoke it in consequential ways. In calendar years 2008-2010, the focus of this study, nearly 14,000 out of about 700,000 Westlaw-reported cases contained allusions to the distinction, but lower courts refused to follow a directive from a higher court because they regarded it as dictum in only about 220 of these cases.¹¹ That is, lower courts made meaningful use of the holding-dictum distinction in fewer than 1 in every 3000 cases.

In our view, the disjunction between dicta-in-practice and dicta-in-theory in lower court decision making has important descriptive and normative implications. The power of lower courts to interpret higher court rulings and, in so doing, demarcate the line that separates dictum from holding is a key constraint on the hierarchical relationship between higher and lower courts. Lower courts' willingness or reluctance to assert their own authority by challenging dicta fundamentally affects the ways in which higher and lower courts speak to each other and shape the law.¹²

Even more importantly, in the traditional image of common law judging, broad doctrine emerges over time as principles uniting individual cases come into focus.¹³ Under this view, lower courts play a critical role in the development of legal principles by exercising their own judgment as to the implications and applicability of past decisions. Treatments of dictum as holding disrupt this process by permitting more sudden and sweeping changes in doctrine.

Relatedly, the vitality of the holding-dictum distinction is highly relevant to the ongoing debate over judicial minimalism. Minimalists argue that narrow, fact-specific holdings are less prone

evaluating higher court treatments of its own dicta, see *infra* text accompanying note 40.

11. We present detailed data and findings in Part II.

12. This is not to say that lower courts always rule in ways consistent with higher court dicta. It is possible, for example, that lower courts evade the force of higher court dicta by making precedent-based distinctions. At the same time, for reasons we will discuss, *infra* Part III.A, lower courts still bow to the authority of higher courts by pursuing such middle course alternatives.

13. Michael Dorf describes this process as lower court "elaboration" of higher court precedent and distinguishes it from the "execution" model, in which lower courts believe "that their job is to execute the law as found in already decided cases, but not to craft novel interpretations." Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 664-66 (1995).

to factual error and more likely to facilitate constructive conversations among courts, elected officials, and the American people.¹⁴ Whether or not these claims are correct, lower court treatments of dictum as holding complicate the pursuit of the judicial minimalists' project. In particular, judicial minimalism looks to lower courts to examine the workability of higher court precedent in different factual contexts, including changes brought about by social and political developments.¹⁵

The Essay proceeds in three Parts. We begin by describing the centrality of the holding-dictum distinction to both the development of law and the broader academic debate about whether courts should issue minimalist decisions. In the second Part, we describe our sample of federal and state court decisions, explain and illustrate our coding criteria and decisions, and present our findings, casting doubt on the willingness of lower courts to participate in a dynamic interchange with higher courts in the development of legal principles. We conclude with a preliminary assessment of the ramifications of this study for the dynamic between higher and lower courts and the vitality of traditional common law judging.

I. THE HOLDING-DICTUM DISTINCTION IN THEORY

The distinction between holding and dictum reflects fundamental norms of American law, from the common law precept that legal principles develop incrementally, with any one decision having only a limited impact, to Article III's requirement that judges decide concrete disputes and not issue advisory opinions. As Karl Llewellyn put it, a "court can decide nothing but the legal dispute before it.... Everything, but everything, said in an opinion is to be read and understood only in relation to the actual case before the court."¹⁶

14. For general treatments of judicial minimalism, see generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971 (1999); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000).

15. Judicial minimalism likewise asks higher courts to revisit their own precedent by looking at subsequent factual developments as well as the actions of elected officials and the American people. See SUNSTEIN, *supra* note 14, at x.

16. KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 14 (Paul Gewirtz ed., Michael Ansaldi trans., 1989) (emphasis omitted).

The importance of the distinction to legal theory is highlighted from the beginning of a lawyer's training. Law students are often taught that the American legal system sees dicta as neither binding nor normatively desirable and typically spend significant time and energy looking for the line separating the two.¹⁷ In constitutional law, students learn that the very case that established judicial review, *Marbury v. Madison*, is filled with dicta. Specifically, because the Court discussed the merits of the *Marbury* dispute before concluding that the Court was without jurisdiction to rule in favor of the plaintiff, *Marbury* is often depicted as a prime example of judicial overreaching.¹⁸ More tellingly, the case method that dominates legal instruction teaches students that the legal craft is about the careful reading of cases and, with that, the ability to separate holding from dictum. For law students, to treat dictum as holding is to misunderstand the case before them.

The importance of the distinction is also reflected in concerted efforts by scholars to delineate it¹⁹ and by the fact that lawyers and judges speak of it so often. As we will explain shortly, we found, over a three-year period, several thousand cases per year in which judges used the term "dicta" or "dictum" in an opinion. During the same three-year period, there were 8406 references to dicta in federal court of appeals briefs and 12,946 references in state court of appeals and state supreme court briefs.²⁰

The reason the dicta concept matters so much to theory and, in our view, deserves far more empirical attention, is that it gets to the

17. Judge Pierre N. Leval went so far as to argue that law students "are not well trained for the profession" if they do not understand the difference between holding and dictum. Leval, *supra* note 8, at 1282; *see also* Greenawalt, *supra* note 9, at 431.

18. In particular, because the Court ruled against *Marbury* on jurisdictional grounds, 5 U.S. (1 Cranch) 137, 176, 180 (1803), the Court's discussion of whether *Marbury* was entitled to a judicial commission, *id.* at 162, 167-68, had nothing to do with the ultimate resolution of the case. Academics and law school casebooks regularly call attention to this fact, typically to question this aspect of the Court's decision. For one particularly well-known example, see William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1. For an alternative view, see Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1736-37 (1998) (defending Marshall's "advicegiving" in *Marbury*).

19. For a sampling of this literature, see *supra* note 9.

20. These numbers are based on a Westlaw search of "dicta" or "dictum" in the databases of federal court of appeals briefs and state court of appeals and supreme court briefs. *See* E-mail from Fred Dingley, Reference Librarian, William & Mary Law Sch., to Professor Neal Devins, William & Mary Law Sch. (July 30, 2012, 9:03 AM) (on file with author).

core of how the law is made in a system of precedent. When few efforts are made to distinguish dictum from holding, the dynamics of judicial decision making will resemble what Michael Sean Quinn has called an “Imperial Theory” of precedent. Under this approach, “when a principle of law has been deliberated upon (i.e., thought about), expressly formulated, and posited as law by an appellate court, it *must* be followed in similar cases.”²¹ The result is a system of concentrated law-making power. “The past dominates the present. Higher courts dominate lower courts. Any feedback from lower courts to higher courts is accomplished informally. Lower courts have little discretion.”²²

In contrast, the more strictly courts distinguish between holding and dictum, the more closely we can expect the system of precedent to correspond to a traditional view of common law judging. In this view, the law-making power of the precedent-setting court is more circumscribed, and law develops more flexibly. As Edward Levi put it in his classic book on legal reasoning, “the doctrine of dicta forces” the judge deciding a case to make her “own decision.”²³ She

is not bound by the statement of the rule of law made by the prior judge even in the controlling case.... It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification.²⁴

Under this traditional view, lower courts both reason by analogy and take into account changing conditions—either factual or policy developments—when “elaborating” on higher court precedent.²⁵

What is at stake is not just how the law is made, but *how well* it is made. Much of the legal literature about dicta—and the related prohibition of advisory opinions—at least implicitly favors the

21. Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 698 (1999); see also Dorf, *supra* note 13, at 664-68 (discussing “execution” theory of precedent and distinguishing it from the “elaboration” theory of common law decision making).

22. Quinn, *supra* note 21, at 704.

23. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1949).

24. *Id.* at 2-3.

25. Dorf, *supra* note 13, at 665-67.

traditional approach to precedent.²⁶ In explaining why dicta need not be followed, for example, Michael Dorf advances both legitimacy arguments (“courts have legitimate authority only to decide cases, not to make law in the abstract”) and instrumental arguments (“[d]icta are less carefully considered than holdings, and, therefore, less likely to be accurate statements of law”).²⁷ Correspondingly, scholars who embrace judicial minimalism caution that courts must recognize limits in their ability to craft doctrinal solutions that are workable over a broad range of issues. By limiting their rulings to the case before them, judges can learn about the consequences of different legal holdings and pursue an “empirically informed” jurisprudence in which judicial errors are “less frequent and (above all) less damaging.”²⁸ When “the relevant facts are in flux and changing very rapidly, and the consequences of current developments are hard to foresee,”²⁹ courts should exercise caution to avoid risking populist attacks on their legitimacy and reprisals from elected officials.

Dicta, no doubt, are disfavored by courts and most legal scholars. At the same time, some scholars who caution against the use of dicta recognize that judicial advice giving is not always inappropriate.³⁰ For example, a higher court that invalidates governmental conduct on statutory grounds might nonetheless signal that the constitutionality of the statute is also in doubt—so that an agency or legislative body should not assume that the government can pursue its favored policy without risking a constitutional challenge.³¹ More significantly, some scholars embrace either informal judicial advice

26. For a general treatment of the prohibition against advisory opinions, see Phillip M. Kannan, *Advising Opinions by Federal Courts*, 32 U. RICH. L. REV. 769 (1998). Unlike federal courts, some state courts are required by either statute or state constitutional provision to render advisory opinions. See Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1845-46 (2001).

27. Dorf, *supra* note 8, at 2000-01; see also Leval, *supra* note 8, at 1255-60 (offering both legitimacy and instrumental arguments to caution against the reliance on dicta).

28. SUNSTEIN, *supra* note 14, at 4, 255.

29. *Id.* at 174.

30. For an argument that advice giving is inevitable, see Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 655 (1995) (arguing that appellate courts inevitably give advice because the reasons they give for their decisions are always more general than the specific proposition before the court).

31. Dorf, *supra* note 8, at 2006-07.

giving or the formal issuance of broad judicial rules. According to Neal Katyal,

The most obvious advantages of advicegiving flow from its nature as dicta, particularly its ability to mediate the tensions in a system of law based on stare decisis.... Advice in judicial decisions acts as a compromise—such language does not have the binding force of a holding yet provides some guidance and predictability for the future while simultaneously undermining some of the reliance interests that would mandate future application of stare decisis.³²

A judicial formalist might go one step further, calling for higher courts to bind lower courts through broad judicial rulings—rulings that may speak to a range of issues not directly before the court. Recognizing that “an important function of law is to settle authoritatively what is to be done,”³³ one could view binding, authoritative settlements of legal disputes by high courts as salutary. Authoritative settlement may also solve coordination problems—that is, problems related to the uncertainty of knowing whether a legal ruling will or will not apply in factually distinguishable cases—and thus, serve efficiency values.³⁴

These competing normative perspectives on judges’ role in the development of law imply different views of where the line between holding and dictum should be drawn. Judicial minimalists would likely embrace a narrower view of what constitutes a holding and, in so doing, categorize as dictum any language that is not necessary to the resolution of a dispute before the court. Under this view, lower courts have substantial authority to shape the development of law by enforcing the holding-dictum distinction and otherwise engage in common law judging. Formalists would likely prefer broad, authoritative judicial opinions and be more likely to treat

32. Katyal, *supra* note 18, at 1714.

33. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997). For a competing perspective, see Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998) (arguing that stability in the law is best achieved through a dynamic process in which other parts of government challenge Supreme Court rulings).

34. See Larry Alexander, “*With Me, It’s All er Nuthin*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 534 (1999).

such statements as part of the court's holding. More fundamentally, formalists look for higher courts to lay down rules that will constrain the discretion of lower court judges.

In the next Part, we investigate whether the role that lower courts actually play comes closer to a minimalist ideal or a formalist ideal. More precisely, we ask how often judges identify a precedential statement as dictum and decide at least some question in the case differently than they would have if they saw the language as a holding. In doing so, we recognize that the behavior of lower courts is only part of the story, for higher court treatment of its own dicta also speaks to both the salience of the holding-dictum distinction and the debate between minimalists and formalists.³⁵ Nonetheless, we believe our focus on lower courts is the best place to start looking at the real-world importance of the holding-dictum distinction.

In part, as we will soon detail, lower court invocations of the distinction are better suited to empirical measurement than are higher court invocations. More significantly, the behavior of lower courts is crucial to the common law system of judging. Because cases originate in lower courts and the vast majority are terminated there, it is lower courts' treatment of dicta that matters most for how the legal system operates. Even if higher courts freely disregard their own dicta, if lower courts do not—that is, if lower courts treat dicta as holdings—then dicta will be part of the law as experienced by lawyers, litigants, and potential litigants.

II. THE DISTINCTION IN PRACTICE

We are not the first to wonder how well theory and practice align with respect to dicta. In fact, there have been fairly frequent reports in recent years of failures to distinguish between dictum and holding. Academics contend that judicial opinions “are often larded with dicta,” including “passing observations, generalizations, analogies, illustrations, or asides not necessary to the resolution of the case.”³⁶ A federal circuit judge wrote, “I cannot tell you how many times I have read briefs asserting an improbable proposition of law

35. See, e.g., Leval, *supra* note 8, at 1250 (“We judges regularly undertake to promulgate law through utterance of dictum made to look like a holding Also, we accept dictum uttered in a previous opinion as if it were binding law, which governs our subsequent adjudication.”).

36. EVA H. HANKS ET AL., *ELEMENTS OF LAW* 64 (2d ed. 2010).

and citing a case as authority ... [only to find that] the proposition is indeed there, but was uttered in dictum.”³⁷ Still, these reports are largely impressionistic and not specifically focused on the behavior of lower courts. Determining how important the dicta distinction is to lower court judging requires systematic investigation of how dicta from above are treated.³⁸ We provide that here, examining how often, when judges see a precedential statement as dictum, they decide at least one question in the case differently than they would have if they saw the language as a holding.

Our investigation is inevitably somewhat complicated, for the mere fact that a court invokes the distinction or refers to a statement as “dictum” does not mean that the distinction has real consequences for the judge’s actions. For instance, it is common for a court to describe a statement from another court as dictum but decide consistently with that statement.³⁹ In that situation, the distinction plays no role in the decision; the end result is precisely the same as if the statement were classified as a holding. To understand the role of dictum and holding in judicial decision making, it is crucial that we identify criteria for determining when the distinction actually produces a decision or opinion that is different in important ways from what would have been produced in a system that does not recognize the distinction.

For this very reason, there is much more to be learned from examining how lower courts treat dicta from higher courts than examining how higher courts treat their own dicta. Consider, for example, a case in which a higher court judge justifies discounting precedent from her own court on the ground that it is dictum. When this occurs, there is no way of knowing whether the judge would have reached the opposite result if she had thought the precedent

37. Leval, *supra* note 8, at 1263; *see also* Thomas L. Fowler, *Holding, Dictum ... Whatever*, 25 N.C. CENT. L.J. 139 (2003); Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219 (2010).

38. The closest to such an investigation is Josh Blackman, *Much Ado About Dictum; or, How to Evade Precedent Without Really Trying: The Distinction Between Holding and Dictum* (Dec. 10, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1318389, in which the author read all cases identified by West as discussing the concept of dictum in order to catalogue the approaches courts put forward for distinguishing between holding and dictum and responding to dictum.

39. *See, e.g.*, *United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996) (“[W]e treat Supreme Court dicta with due deference, and see no reason not to apply [it] in the case at bar.”).

was a holding instead of dictum. Even assuming that the norm of stare decisis matters to judges, the fact is that they can normally overrule, limit, or otherwise change precedents they dislike at will.⁴⁰ It seems certain that in at least some—and perhaps many—cases labeling precedent from one’s own court as dictum is a largely rhetorical move, used to justify an action the court would have taken anyway. If the concept of dicta did not exist, the decisions in these cases would be no different. Of course, we cannot be certain that this is true in any particular case, but counting all such cases as examples of the distinction’s meaningful influence would undoubtedly overstate that influence.

In contrast, when a lower court avoids the force of a higher court’s statement by labeling it dictum, we can be more certain that the dicta distinction played a key role in its thinking. A lower court is considered bound by the precedent of the court or courts above it. A court would violate its professional obligations if it failed to apply relevant precedent, and this failure would be expected to bring both reversal by the higher court and censure from the bar and bench.⁴¹ When a lower court invokes the concept of dictum as the basis for evading the force of a higher court’s statement, the court concedes that it otherwise would be obligated to apply the statement. More than this, the court calls attention to its refusal. Hence, the rhetorical role played by the distinction is quite different from in the higher court—inviting examination and criticism rather than deflecting them.

Thus, we focus in this Essay on cases in which a court identifies a statement from a higher court as nonbinding dictum. For each such case, we determine whether the holding-dictum distinction plays a central role in justifying a decision at odds with the higher court’s statement. In the following Section, we explain the criteria we relied on to make this determination, demonstrate how they were applied, and report our findings about the general unwillingness of federal courts of appeals, federal district courts, and state

40. Stare decisis, of course, does not apply to situations in which higher courts review lower court decision making. Consequently, when higher courts reference dicta in lower court decision making, it is impossible to draw any conclusions about whether the fact of its being dicta was important to its decision.

41. See *infra* notes 61-67 and accompanying text.

courts to invoke the holding-dictum distinction in consequential ways. Before doing so, we describe our search method and sample.

A. *The Cases*

Our data are drawn from opinions handed down from the beginning of 2008 to the end of 2010 by U.S. federal and state trial and intermediate appellate courts. These opinions were identified through full-text searches in Westlaw for the terms “dictum,” “dicta,” “not a holding,” or “not the holding.” Both formally published and unpublished opinions are included.

The search yielded 1649 cases from the U.S. courts of appeals, 8809 cases from U.S. district courts, and 3365 cases from state trial and intermediate appellate courts. Because these were too many cases to code, we randomly sampled several hundred cases from each set: specifically, 330 (20%) from the U.S. courts of appeals, 440 (5%) from U.S. district courts, and 336 (10%) from state courts. Before proceeding, it is worth noting that 13,823 hits in these three years strikes us as conclusive evidence that the concept of dictum is alive and present in judges’ minds. What it does not tell us is whether the concept is consequential for their decision making.

To address this question, we must look at the sample of 1106 cases more closely. First we must isolate those cases in which the opinion of the court identifies a statement from a hierarchical superior as dictum or denies that it is a holding. A total of 213 cases fit this criterion. Of the 893 cases that do not, 201 involve references to the citing court’s own precedent, 264 involve references to precedent from another court with no authority over the citing court, and 428 do not involve a reference to precedent.⁴²

42. The references in the last category took a variety of forms, such as abstract discussions of the concept, quotations in which a scholar or another court referred to a statement as dictum, and rejections of litigants’ claims that certain statements were dicta. Notably, a number of these cases involved quotations of *Williams v. Taylor*, 529 U.S. 362 (2000), in which the Supreme Court, interpreting language in the Antiterrorism and Effective Death Penalty Act of 1996, said that in habeas corpus proceedings, “clearly established Federal law’... refers to the holdings, as opposed to the dicta, of this Court’s decisions as of the time of the relevant state-court decision.” *Id.* at 375, 412. A handful of cases in this category did involve references to precedent but were excluded because the references appeared in a concurring or dissenting opinion, not the opinion of the citing court.

For the remainder of this Essay, we focus on the 213 cases in which a lower court identified a statement from a higher court as dictum. Each of the 213 was coded independently by two different coders to determine whether the holding-dictum distinction could reasonably be seen as playing a key role in the court's decision. When both coders reached the same conclusion—either positive (that the distinction could be viewed as having affected the decision) or negative (that it could not)—that conclusion was accepted. In the twenty-eight cases in which the coders reached different conclusions or either expressed doubt, the case was reanalyzed and discussed until a confident conclusion could be reached. When we were unable to decide with confidence, the case was recorded as a positive example.

B. Findings

As became abundantly clear very early in this study, the mere fact that a lower court identifies a statement from a higher court as dictum does not mean that the lower court is unwilling to act as if the statement were a holding. In fact, sixty-eight (32%) of our cases are examples of unambiguously positive citations, in which the statement in question is cited in support of a particular proposition, and the citing court gives no indication that it is free to disregard the statement. The only thing distinguishing these from ordinary positive citations is that the citing court identifies the statement, in passing, as dictum.

Some of these are just casual references in string citations.⁴³ Many are more substantive. For instance, in a 2009 case, the Court of Appeals of Oregon justified a decision this way:

We base that conclusion on two factors.... Second, in *Moore v. Motor Vehicles Division*, the [Oregon] Supreme Court (in dictum) stated, “An administratively imposed penalty based on [a legally

43. *E.g.*, *IGY Ocean Bay Props., Ltd. v. Ocean Bay Props. I Ltd.*, 534 F. Supp. 2d 446, 448 (S.D.N.Y. 2008) (“However, diversity does not exist within the meaning of these sections where on both sides of the dispute the parties are all foreign entities, or where on one side there are citizens and aliens and on the opposite side there are only aliens. See *Universal Licensing Corp. v. Paola del Lungo S.p.A.*, 293 F.3d 579, 580-81 (2d Cir. 2002) (citing *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 381 (1959) (dictum) and *Dassigienis v. Cosmos Carriers & Trading Corp.*, 442 F.2d 1016, 1017 (2d Cir. 1971) (per curiam)).”).

unauthorized] procedure would be invalid.” In light of the foregoing, we allow the petition for reconsideration and now hold that the suspension of petitioner’s driver’s license is reversed.⁴⁴

Another example, striking but not atypical, comes from an opinion of a federal judge in New Jersey considering the implications of a U.S. Supreme Court holding and dictum from the Third Circuit:

The holding of *Sell* is consistent with dictum in *Rennie*, which instructs that, in an emergency, antipsychotic drugs may be constitutionally administered only when “such an action is deemed necessary to prevent the patient from endangering himself or others. Once that determination is made, professional judgment must also be exercised in the resulting decision to administer medication.” This portion of *Rennie* is important in two respects.... Taken together, therefore, *Sell* and *Rennie* endorse the proposition that medical authorities must consider lesser-intrusive alternatives before involuntarily administering medication.⁴⁵

In an additional fifty-three cases (25%), the dictum statement is simply mentioned in passing in a peripheral section of the opinion. The lower court does not cite the statement for support, but neither does it deny that the statement is authoritative or decide in a way inconsistent with it.⁴⁶

In the remaining ninety-two cases (43%), the citing court either stated or implied that what it called dictum was entitled to less weight than it would carry if a holding. Nevertheless, most of these cases do not allow a reader to conclude that the court’s opinion would have been different in any important way if it had considered the higher court’s statement a holding.

44. *Hays v. Driver & Motor Vehicle Servs. Div.*, 216 P.3d 902, 903 (Or. Ct. App. 2009) (citation omitted).

45. *Brandt v. Monte*, 626 F. Supp. 2d 469, 488-89 (D.N.J. 2009) (emphasis and citation omitted).

46. At this point, some readers may be wondering why a court would bother to point out that a statement is dictum if it is relying on the statement for support or sees it as irrelevant to its analysis. We confess that we too are puzzled by this. Our best guess is that the habit of distinguishing between dictum and holding is so ingrained that judges or their clerks often make the distinction automatically even when nothing hinges on it.

In twenty of these cases, the lower court indicated that the higher court's subsequent holdings superseded the dictum statement. Holdings can be superseded by subsequent holdings just as dicta can; therefore, in these cases the fact that the lower court considered a statement dictum played no role in its treatment of it.

In another sixteen cases, we coded the dictum statement as "nondirective." What we mean by this is that the statement from the higher court, even if considered binding, could not be understood as imposing a requirement on the lower court to analyze or decide an issue in a particular way. Consider the case of *Humphrey v. Sapp*.⁴⁷ There the district court confronted this statement from the Sixth Circuit: "[Absolute] immunity extends to unintentional errors in the petition [to remove children from their parents' custody]."⁴⁸ Had the question before the district court been whether to recognize absolute immunity for an unintentional error, this certainly would have counted as a directive statement. However, the actual case before the district court involved an intentional misrepresentation. As the district court noted, the circuit court's statement could be read to "imply that an *intentional* misrepresentation in a petition is *not* protected by absolute immunity."⁴⁹ Yet the circuit court's statement does no more than imply this—if it even does—and a lower court that ruled that immunity does apply in cases of intentional immunity could not fairly be criticized for failing to follow precedent. In such cases, the decision to treat a statement as dictum or holding makes no difference; what matters is that the statement does not tell a lower court what it should do.

In an additional twenty-three cases, after calling into question the authority of a precedent from a higher court, the lower court distinguished the precedent or otherwise indicated that the issue involved was irrelevant to the decision before it. Most such cases were easy to code, but we give as an example one that required more judgment.

In *United States v. Henderson*, police went to Henderson's home in response to a report of domestic abuse.⁵⁰ They entered the home, Henderson ordered them out, and they arrested and removed him.

47. No. 3:09-CV-305-H, 2010 WL 1416705 (W.D. Ky. Mar. 31, 2010).

48. *Id.* at *9 n.3.

49. *Id.* (emphasis added).

50. 536 F.3d 776, 777-78 (7th Cir. 2008).

After he was removed, his wife consented to a search of the house. The police discovered weapons and drugs, and Henderson was indicted for weapon and drug crimes. At his trial, he moved for suppression of the evidence from the search, as he had expressly refused permission for the search before being removed.

The key passage for the dictum analysis was from the Supreme Court's opinion in *Georgia v. Randolph*.⁵¹ In *Randolph*, the Court allowed cotenants to authorize such searches "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection."⁵² In *Henderson*, the Seventh Circuit opined that the *Randolph* Court's "passing reference to pretextual arrests carried out for the purpose of evading an objection to search was not a holding,"⁵³ but immediately continued:

In any event, the Court's dicta should not be overread to require the invalidation of an otherwise valid third-party consent search where the objecting tenant is removed from the home based on a *legitimate*, nonpretextual arrest. Here, Henderson was validly arrested based on probable cause to believe he had committed a domestic battery; there is no evidence to suggest he was removed from the home "for the sake of" evading his objection to the search.⁵⁴

The circuit judges explicitly stated that the line relied on by the defendant was dictum, and perhaps the belief that it was dictum played a part in their decision. However, this was clearly not the crux of the argument. The circuit judges' main point was that the line from *Randolph* did not address the rights of the objecting tenant in the situation in which he is validly arrested—as all agreed Henderson was. If the above passage from *Henderson* did not include the sentence about "passing reference," and the sentence following it were rewritten as "In any event, the Court's *holding* should not be overread," the argument would not lose any force.

51. 547 U.S. 103 (2006).

52. *Id.* at 121.

53. *Henderson*, 536 F.3d at 783 n.5.

54. *Id.*

In cases such as this, when a statement that might be considered dictum is immaterial to a decision now before a court, the decision whether to treat it as dictum is necessarily also immaterial; the lower court's decision will be the same either way. Note that in evaluating relevance, we approached the question from the perspective of the deciding court. That is, if the lower court treated the issue involved as one that required a decision in the case before it, we coded the dictum statement as relevant. We did not ask whether, in some objective sense, deciding the issue was necessary. We coded it as irrelevant only if the lower court indicated that deciding the issue was unnecessary.

Finally, in sixteen cases, despite denying implicitly or explicitly that it was bound by the higher court's statement, the lower court nevertheless decided the relevant issue consistently with that statement. Here, too, each lower court decision would have been the same in all important respects in a world in which no distinction was made between dictum and holding. They do not count as consequential invocations of the distinction.

In the end, our examination of 213 cases uncovered seventeen consequential invocations of the distinction—that is, seventeen cases in which there are strong grounds for concluding that the lower court would have decided some issue differently if it had understood the higher court's statement to be a holding rather than dictum. As shown in Table 1, the numbers break down as follows by type of court: four in U.S. courts of appeals, seven in U.S. district courts, and six in state courts.

Recall that we could not examine all of the cases returned by our Westlaw search; rather, we sampled 20% of the circuit court cases, 5% of the district court cases, and 10% of the state court cases. Thus, to generate estimates of the total number of consequential invocations from 2008 to 2010, we must multiply the totals by five, twenty, and ten respectively. Doing those calculations yields our best estimates of 20 total cases in the U.S. courts of appeals, 140 total cases in U.S. district courts, and 60 total cases in state courts for the entire three-year period.

Table 1: Holding-Dictum Invocation in Case Sample

	U.S. Circuit Courts	U.S. District Courts	State Courts	Total
Positive Citation	16	33	19	68
Passing Reference	7	22	24	53
Dictum Superseded	1	15	4	20
Dictum Nondirective	3	10	3	16
Dictum Irrelevant	10	7	6	23
Decision Consistent with Dictum	5	7	4	16
Consequential Invocation	4	7	6	17
Total	46	101	66	213

In our view, these numbers are remarkably low, especially when one considers baselines. The Westlaw database contains 80,421 cases decided by circuit courts between 2008 and 2010, 327,524 cases decided by district courts, and 295,452 decided by state courts. Thus, our results indicate that the distinction between dictum and holding plays an important role in lower court decision making in fewer than 1 in every 2000 federal district court cases (140 out of 327,524) and in fewer than 1 in every 4000 state court (60 out of 295,452) or federal circuit court (20 out of 80,421) cases. Combining all cases, we estimate that consequential invocations of the holding-dictum distinction occur about once in every 3200 cases (220 out of 703,397).⁵⁵

We acknowledge that some difficult judgment calls underlie these estimates and recognize that other scholars might consider some cases we excluded to be consequential invocations. That said, we are confident that the number of such cases would be too small to change the central message of our findings. Furthermore, disagree-

55. Although the Westlaw database is fairly complete, not all court opinions are submitted to it, so some unavailable cases might have met our criteria for counting. However, because the sample of cases not contained on Westlaw is likely to be skewed toward routine or procedural dispositions, it very likely contains a smaller proportion of consequential invocations. Surely, it is safe to assume that the incidence of consequential invocations is not significantly higher in the missing cases.

ments would not necessarily go in only one direction; other scholars might reject some of the cases that made it into our count.⁵⁶

We also acknowledge that our Westlaw search strategy probably missed some cases in which lower courts confronted dicta from higher courts but did not draw attention to the fact that the statements were dicta. It is, of course, possible that in some such cases the lower courts chose to disregard statements that otherwise would have provided important guidance for their decisions precisely because they were dicta. However, we think it highly unlikely that there are a substantial number of such cases. As we have already demonstrated, it is considered perfectly appropriate for lower courts to point out that a statement from a higher court is dictum, and they are not reticent about doing so. On the other hand, we suspect that very few judges would purposefully engage in unprofessional conduct by pretending not to notice a statement from a higher court that appears to bear on the case being decided. We think it far more likely that missing cases involve positive treatments of dicta: lower courts do not bother to point out that a statement is dictum because they are drawing on it for guidance or support regardless of its status. Thus, if the missing cases could somehow be identified and analyzed, the ratio of positive to negative citations of dicta would probably be even higher than it is in our study.

Ultimately, then, we are confident that the picture we present is accurate in its essentials: the holding-dictum distinction plays a very limited role in lower court decision making. The average contemporary judge could expect to go years at a time without relying on the concept to reach a decision. For most lawyers, seeing a court disregard a significant statement from a higher court because it is dictum will literally be a once-in-a-lifetime experience.

III. IMPLICATIONS

Our findings suggest that there is a dramatic gulf between dicta-in-theory—where the line separating dictum from holding is extremely consequential—and dicta-in-practice—where the holding-dictum distinction seems largely irrelevant. This gulf matters

56. To enable readers to judge our choices for themselves, we have prepared an appendix listing the coding for each of the 213 cases we examined in detail. *See infra* Appendix.

because by not invoking the distinction, lower courts affect both the balance of power between themselves and higher courts and the possibility of minimalist common law decision making. In this Section, we examine the implications of our findings for the dynamics of law making in American courts and for the practice of lawyers in those courts.

A. Lower Court-Higher Court Dynamics

Before we begin, it is important to note that the case for the importance of our results rests on a premise that higher courts frequently include statements that could reasonably be regarded as dicta in their opinions. Although we recognize that we cannot definitely establish this premise, it is highly consistent not only with commentary from academics and judges⁵⁷ but also with evidence from this study. Recall that in the sample we analyzed, we found 213 cases in which a statement from a higher court was labeled “dicta” or “dictum.”⁵⁸ Extrapolating to the cases that were returned by our search but not read, we can assume that there were over two-thousand such cases from 2008 to 2010. Even recognizing that a nontrivial portion of the labeled statements could not be considered statements of law, we are left with a very large number. And these are just the instances in which a statement was tagged as dictum. We have no way of knowing how many times a lower court quietly followed a higher court despite doubts about whether what it was following was a holding.

Similarly, even though some dicta doubtless escape lower courts’ notice, this phenomenon cannot explain lower courts’ near abandonment of the holding-dictum distinction. We certainly take the point of commentators who suggest that, because of changing norms and practices in both opinion writing and legal research, lawyers and judges have become less alert to the distinction between holding and dicta.⁵⁹ For example, today’s lawyers are trained to do legal research by looking at key words in large databases; the result is that far less time is spent reading cases, and there is far less

57. See *supra* notes 36-37 and accompanying text.

58. See *supra* note 42 and accompanying text.

59. See Fowler, *supra* note 37; Stinson, *supra* note 37, at 221; see also Leval, *supra* note 8, at 1263 (noting that advocates often treat dictum as holding in their briefs).

awareness of whether language in a judicial opinion is central to the case holding. Judges and their clerks make use of these same databases. Nevertheless, it is obvious from the numbers just reviewed that failure to detect dicta cannot explain what we have observed. Judges spot dicta often enough for the identification of it to play a major role in their decisions, but it does not.

It seems, then, our findings must be attributed, at least partially, to frequent decisions to abide by statements from higher courts even though they are recognized as dicta. In making these decisions, judges profoundly affect hierarchical dynamics in courts. They also shape the way in which law is produced and developed in the judicial system as a whole. They move the legal system away from the shared, incremental decision making envisioned in traditional conceptions of common law judging and by contemporary minimalists, and they enable bold law making dominated by higher courts.⁶⁰

This is true regardless of whether lower courts voluntarily embrace dicta or follow it unwillingly. Still, if lower courts follow dicta against their wishes, we might expect to find them more assertive about their prerogatives elsewhere. For example, lower courts can constrain higher court law making through their power to interpret, limit, and distinguish higher court precedents. On the other hand, if they willingly embrace dicta, we should expect to find them ceding power to higher courts in other respects too. Consequently, an understanding of why lower courts accept dicta could provide insight into whether the deference found here is likely to hold in other aspects of their decision making.

To the extent that judges follow dicta unwillingly, it is almost certainly because they wish to avoid being reversed by a higher court.⁶¹ Reversal, of course, undermines the legal policy preferences

60. The effects of lower court choices may extend well beyond the specific cases before them by providing higher courts with an incentive to address issues not immediately before them—knowing that lower courts would follow such declarations. In this way, the minimalist project of incremental judicial decision making might be further undermined in favor of a hierarchical system dominated by higher courts (something that formalists might well embrace).

61. There is disagreement in the literature about the extent to which lower courts consider fear of reversal in their decision making. *See, e.g.*, Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 398 (2007); David E. Klein & Robert J. Hume, *Fear of Reversal As an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579 (2003); Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in U.S. District Courts*, 36 AM. POL. RES. 669, 675-76 (2008).

of lower court judges. Furthermore, judges may be motivated by “(1) fear that their professional audience, including colleagues, practitioners, and scholars, will disrespect their legal judgments or abilities; (2) fear that a high reversal rate might reduce opportunities for professional recognition and advancement ... and (3) the perception that reversal undercuts their de facto judicial power.”⁶² And judges, trial judges especially, will not welcome the return of cases that they thought had been cleared from a crowded docket. It is a small step from the assumption that judges prefer not to be reversed to the assumption that they will generally avoid taking actions that invite reversals.

Of the steps that a lower court can take to evade the force of an opinion from above, calling a higher court’s statement dictum would seem to be the most confrontational, short of outright defiance. Compare that practice with distinguishing, for example. The lower court distinguishing a precedent recognizes both the validity of the precedent and the lower court’s general obligation to follow it; it denies only an obligation to follow it in this particular case, which it claims to be insufficiently related. In contrast, the court crying dictum denies its obligation to follow the statement from the higher court in any circumstances; beyond this, it denies the validity of the statement as an expression of the law. The latter action is a much more direct challenge to the authority of the higher court, and so it could expect to attract close scrutiny on appeal.⁶³ Knowing this, the lower court might accept guidance it would prefer to evade when the only available ground for evasion is the claim of dictum.

In this account, lower courts are reluctant enablers of higher court dicta; they would like to disregard it but fear the consequences. If this account is correct, then lower courts may be willing to employ less confrontational methods, like distinguishing, to reach results that they prefer and, in so doing, shift control to a degree

62. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 77-78 (1994) (footnote omitted); see also Dorf, *supra* note 13.

63. Judges’ reluctance to rely on the dicta concept may be heightened by the fact that the line between holding and dictum can be so hard to discern. “If the distinction between holding and dictum were clearly demarcated, lower courts might not hesitate to ignore higher courts’ dicta. Because the distinction has not been so demarcated, however, declaring a prior statement dictum is quite similar to overruling a previously established legal principle.” Dorf, *supra* note 8, at 2027 (footnote omitted).

from the court that set the precedent to the courts applying it. Of course, in failing to challenge dicta, they would still cede much of their common law power to participate in a dialogue with higher courts and impose constraints on the law-making power of higher courts.

An alternative account is that lower court judges willingly embrace dicta; that is, they respect it because they want to, not because they think they have to. Dicta “can help clarify a complicated subject” and “can assist future courts to reach sensible, well-reasoned results.”⁶⁴ For these and other reasons, it may simply be easier for a lower court facing a large caseload to follow cues from above without thinking too hard about whether those cues are authoritative. Or perhaps, the lower court judges simply think it proper to defer to the views of higher courts, even when those views are not technically binding. If this second account is correct, then we might expect them usually to forgo even distinguishing and other less confrontational means of asserting their own role in law making. For good or ill, higher courts will dominate the development of doctrine, and the first announcement of a legal principle will often have a very strong influence on doctrine.⁶⁵

Although our evidence does not definitively tell us whether judges follow dicta reluctantly to avoid being reversed or embrace it willingly, we think it is more supportive of the latter explanation. The most striking evidence is the large proportion of cases in which judges, though explicitly noting that a statement is dictum, rely on it for support or guidance.⁶⁶ Recall that those cases constitute nearly a third of our sample.

More subtly, the aversion-to-reversal account is undercut by the fact that judges use the terms “dicta” and “dictum” so often, even when discussing statements from higher courts. We encountered a number of cases in which the lower court indicated quite clearly that the cited statement was irrelevant to the case before it but added, unnecessarily, that the statement was dictum. Courts worried that

64. Leval, *supra* note 8, at 1253.

65. Were this to happen, higher courts would have incentive to address issues not immediately before them—knowing that lower courts would follow such declarations. See *supra* note 60 for the possible result.

66. See *supra* notes 43-45 and accompanying text.

claims of dictum will attract unwelcome attention would probably not include those gratuitous comments.

Furthermore, and perhaps more telling, the aversion-to-reversal account is undercut by comparing the practices of trial and appeals courts. Trial court decisions, at both the state and federal level, are often reviewed by higher courts; court of appeals decisions are rarely reviewed. Moreover, with larger jurisdictions, appellate courts can have a greater impact on the law and so have more to gain from bold actions that risk reversal. For both reasons, to the extent that fear of reversal animates lower court treatment of dicta, one would expect trial courts to tread more carefully in invoking the dicta concept. Our evidence, however, suggests the opposite. At the federal level, trial courts relied on the distinction in around 1 in 2000 cases; appeals courts relied on it in around 1 in 4000 cases.⁶⁷ Although this evidence is not conclusive, it does cut against the fear-of-reversal account.

As interesting as this question is, it is not necessary to answer it here. For whichever account is more correct, the central lesson of our study remains the same: by so seldom invoking the distinction between dictum and holding in consequential ways, lower courts voluntarily cede an important element of their common law power. Our evidence makes clear that higher courts can safely assume that lower courts will not invoke the holding-dictum distinction to rein them in. Higher courts can issue sweeping rulings that address questions not immediately before them, knowing that lower courts will not treat those statements as nonbinding dicta. Lower courts will either willingly accept them or will grudgingly accept them while perhaps seeking to limit their reach through their power to distinguish.⁶⁸ Lower courts, however, will not be active participants

67. See *supra* text accompanying note 55.

68. While we highlight two potential motivations for judges—fear of reversal and willful support of higher court authority—we certainly recognize that judicial decision making, as Judge Richard Posner says, cannot be “reduced to a single dimension,” but instead, must take into account that lower court judges increase their utility by advancing their ideological agenda, “economizing on the judge’s time and effort, inviting commendation from people whom the judge admires, benefiting the local community[,] ... and the list goes on.” Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1269-70 (2005). For our purpose, the key fact is that the failure to meaningfully invoke the holding-dictum distinction—*whatever the reason*—fundamentally affects the power of lower courts to make use of their common law powers and, in so doing, affects the balance of power between lower and higher courts.

in the shaping of law in these cases. They will not treat these rulings as dicta and then seek to influence the development of legal rules through incremental decision making that builds upon the essence of the higher court ruling.

B. Dicta-in-Theory Versus Dicta-in-Practice

Our evidence suggests that the distinction between holding and dictum is at once central to the American legal system and largely irrelevant. Lawyers, judges, and academics refer to “dicta” and “dictum” all the time. But lower courts appear quite reluctant to rest decisions on the ground that dictum is not holding when it really matters. From a practicing lawyer’s perspective, next to nothing can be gained by asking a lower court to treat higher court language as nonbinding dicta.

We do not claim that the holding-dictum distinction has no force whatsoever in judicial decision making. After all, we found evidence that it mattered in some cases. And it may be that higher courts place more weight on the distinction in cases involving their own precedents—this seems especially likely in federal courts of appeals, where panels are typically expected to treat decisions from other panels in the same circuit as binding. Yet even though high courts are the most important source of precedents, trial and intermediate appellate courts are the main arenas in which those precedents play out. From the perspective of lawyers and litigants, law in practice is, most of the time, what lower courts make it; whether a higher court might one day repudiate a statement as dictum makes little difference if at the moment, the statement is tantamount to binding precedent. Understanding how lower courts treat dicta is crucial to understanding the dynamics of precedent, holding, and dictum in the legal system as a whole.

In drawing attention to gaps between theory and practice, in no way do we mean to suggest that scholars should abandon efforts to identify the line separating dictum from holding or otherwise desist from theorizing about dicta. Some of the reluctance of lower courts to make consequential use of the holding-dictum distinction may be tied to discomfort over the drawing of this line—a discomfort scholars could help alleviate. Even if not, if we are right about what is going on in practice, theorists must still evaluate practice against

normative standards and offer arguments for change if they believe lower court behavior is falling short of what it should be.

At the same time, there is a strong argument to be made that theory entirely divorced from practice can have only limited utility, especially insofar as it is aimed at lawyers in training or practice and is meant not only to identify normative ideals but also to help clarify thinking about how law operates. Ultimately, the ways of the law cannot be dictated entirely from the outside; in large part they must emerge from the actions of judges and lawyers over time.

In our view, then, theoretical scholarship is likely to be of greater value to the extent that it is informed by empirical research. This observation applies not only to the frequency with which the holding-dictum distinction is invoked but also to how judges draw the line in practice. Notably, although we were unable to undertake a systematic analysis of the specific reasons lower courts gave for identifying language as dicta (and indeed courts did not always offer reasons), we very seldom ran across theoretically subtle arguments, such as that the higher court's ruling had swept too broadly. Instead, the typical statement identified as dictum was one in which the higher court addressed an issue tangential to the ones before it—for instance commenting on one section of a statute when the case dealt with another section. We suspect that this represents another important gap, here between the grounds for identifying dicta put forward by theorists⁶⁹ or judges commenting on dicta in the abstract⁷⁰ and the grounds judges actually rely on in practice, with the latter being much narrower.

CONCLUSION

By shifting focus from dicta-in-theory to dicta-in-practice, our study illuminates the ways that the holding-dictum distinction matters to judging. By demonstrating that lower courts very rarely invoke the holding-dictum distinction to reach decisions at odds with higher court dicta, our study makes clear that dicta-in-practice is quite different from dicta-in-theory, at least with respect to lower

69. See Abramowicz & Stearns, *supra* note 9, at 1065; Dorf, *supra* note 8, at 2006-07; Greenawalt, *supra* note 9, at 433-34.

70. See Blackman, *supra* note 38, at 20.

court decision making. Neither the admonition against advisory opinions nor the common law's embrace of minimalist, fact-specific, incremental decision making has much impact on lower court judges dealing with dicta; it seems that they do not see nullifying higher court rulings as nonprecedential dicta as an important part of their jobs. The explanation for this is not simply that higher court rulings do not contain dicta or that lower courts can never sort out the line separating dictum from holding; the explanation is tied to some deeper understanding of the judicial function by lower court judges.

The disinclination of courts to challenge dicta from higher courts may well have profound effects on the balance of power in the judicial hierarchy. If they like, high courts can speak to any number of questions not directly before them and expect lower courts to either follow their advice or make use of some precedent-based distinction to steer around their decisions. Either way, the power of higher courts is enhanced; dictum becomes holding in some fashion. For high courts interested in maximizing their power through broad rulings, the conflation of dictum and holding is a significant boon to their authority. In other words, our evidence suggests that the recent fight between Chief Justice Roberts and Justice Ginsburg in the health care decision was beside the point. For lower courts, the question is not whether the Chief Justice's Commerce Clause ruling was essential or "puzzling" and unnecessary;⁷¹ for lower courts, what matters is that the Supreme Court provided guidance on the scope of Congress's commerce power.

It may be no coincidence that in recent times higher courts, especially the U.S. Supreme Court, have taken steps to protect their turf as authoritative settlers of legal disputes. The Rehnquist and Roberts Courts, for example, have been criticized for embracing judicial supremacy, including the issuance of maximalist rulings intended to limit the discretion of other governmental actors.⁷²

71. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2629 & n.12 (2012) (Ginsburg, J., concurring in part and dissenting in part); see also *supra* notes 1-6 and accompanying text (discussing Roberts's opinion).

72. For critiques of the Rehnquist Court, see Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003). For critiques of the Roberts Court, see Adam Cohen, Editorial, *Last Term's Winner at the Supreme Court: Judicial Activism*, N.Y. TIMES (July 9, 2007), <http://www.nytimes.com/2007/07/09/opinion/09mon4.html>; Richard L. Hasen, *Money Grubbers*, SLATE (Jan. 21, 2010,

Perhaps these attacks have been overblown at times, but the Court has unquestionably made strong claims about the need for adherence to Supreme Court pronouncements, most notably Court interpretations of the Constitution's meaning, in the American political system.⁷³

More fundamentally, our findings are consistent with the sense of other observers that there has been a weakening of the American system of incremental, minimalist decision making, which is grounded both in the common law and in the Article III prohibition against advisory opinions. With respect to the common law, the holding-dictum distinction simply seems less consequential today than before. In the United States, as Peter Tiersma observed,

[T]he common law is embarking on a path towards becoming increasingly textual [I]t is less and less necessary to search for the holding or ratio decidendi of a case; the judge writing for the majority will often specify exactly what the holding is in carefully crafted text that is meant to fetter the discretion of lower courts in the same way that a statute does. As a consequence, legal reasoning is gradually being supplanted by close reading.⁷⁴

In our view, scholars who care about such issues would do well to think about the conditions that limit the consequential use of the holding-dictum distinction. Some of these conditions are tied to the

12:58 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_grubbers.single.html; Dahlia Lithwick, *The Pinocchio Project*, SLATE (Jan. 21, 2010, 2:15 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2010/01/the_pinocchio_project.html.

73. Consider, for example, this statement by the Rehnquist Court:

Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

City of Boerne v. Flores, 521 U.S. 507, 535-36 (1997) (citation omitted).

74. Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1188 (2007).

hierarchical relationship between lower and higher courts, including the desire of lower courts to steer clear of direct confrontations with higher courts. Others are tied to the persuasiveness of higher court dicta and the efficiency of looking to cues from higher courts in order to manage a large caseload. Whatever the exact dynamics at play, for the study of dicta to have real world significance, scholars must be cognizant of what courts do and why they do it. This Essay is a first step in that enterprise.

APPENDIX

Coding of Citations of Dicta from Higher Courts

<u>Positive Citation</u>	544 F. Supp. 2d 59	591 F.3d 164
2010 WL 548446	2008 WL 793660	621 F.3d 1069
576 F.3d 979	626 F. Supp. 2d 469	517 F.3d 911
587 F.3d 1133	255 F.R.D. 110	543 F.3d 744
616 F.3d 963	719 F. Supp. 2d 7	556 F.3d 1300
2008 WL 5110964	2010 WL 286641	2008 WL 4442611
546 F.3d 682	2010 WL 889292	2010 WL 1254841
538 F.3d 554	2009 WL 323219	2008 WL 2199689
409 Fed. App'x 235	598 F. Supp. 2d 414	723 F. Supp. 2d 987
571 F.3d 108	2008 WL 360986	746 F. Supp. 2d 358
573 F.3d 383	2009 WL 2601245	2008 WL 5657801
524 F.3d 1350	2008 WL 2404967	2008 WL 2915117
577 F.3d 672	2008 WL 346007	686 F. Supp. 2d 956
390 Fed. App'x 963	2008 WL 5378348	2009 WL 5166258
404 Fed. App'x 291	209 P.3d 1130	684 F. Supp. 2d 179
592 F.3d 954	2009 WL 1395825	2009 WL 2710078
401 Fed. App'x 877	2008 WL 963860	2010 WL 3210765
585 F. Supp. 2d 568	2009 WL 497735	2010 WL 3521979
2010 WL 2471693	977 A.2d 228	2010 WL 4638863
620 F. Supp. 2d 857	2009 WL 4682253	2010 WL 5169074
2009 WL 1796763	2010 WL 1611391	649 F. Supp. 2d 262
667 F. Supp. 2d 758	2009 WL 715990	659 F. Supp. 2d 727
2009 WL 2151197	2008 WL 706610	2010 WL 1332715
2008 WL 4372898	2008 WL 2815534	2008 WL 4347017
2009 WL 995139	744 N.W.2d 237	2010 WL 3258134
2008 WL 5279638	2008 WL 5540475	2008 WL 345547
2010 WL 1797412	2010 WL 4025901	2008 WL 4525422
2009 WL 1905047	2010 WL 2553453	327 S.W.3d 570
2008 WL 4148849	881 N.Y.S.2d 839	106 Cal. Rptr. 3d 342
2008 WL 4305921	2008 WL 1970919	2010 WL 4132525
2008 WL 4133573	902 N.E.2d 535	2010 WL 1579662
595 F. Supp. 2d 735	939 N.E.2d 525	775 N.W.2d 895
682 F. Supp. 2d 49	216 P.3d 902	2009 WL 1887150
2008 WL 5169640	<u>Dicta Cited in Passing</u>	2010 WL 3795192
555 F. Supp. 2d 1013	605 F.3d 985	266 S.W.3d 627
2009 WL 1287740	526 F.3d 1334	49 Conn. L. Rptr. 244
		207 P.3d 631
		21 So. 3d 987

2008 WL 3913994	2009 WL 911296	<u>Court Decision Consistent</u>
165 Cal. App. 4th 1291	2008 WL 276406	<u>with Dicta</u>
2009 WL 865287	2009 WL 453917	626 F.3d 592
2008 WL 656678	664 F. Supp. 2d 294	598 F.3d 388
2008 WL 2572617	2008 WL 4200155	531 F.3d 104
314 S.W.3d 225	2010 WL 276756	630 F.3d 17
993 A.2d 921	2010 WL 2816374	608 F.3d 955
2008 WL 946226	2008 WL 4198587	2009 WL 3364037
2008 WL 1799952	2010 WL 1416705	2009 WL 249818
2008 WL 3893789	627 F. Supp. 2d 1232	2010 WL 2245029
2008 WL 5780815	669 S.E.2d 25	2008 WL 4600999
916 N.E.2d 1175	2010 WL 2053336	2009 WL 3713047
700 S.E.2d 766	2010 WL 2336833	2008 WL 5245329
<u>Dicta Superseded by</u>	<u>Dicta Deemed</u>	706 F. Supp. 2d 1029
<u>Subsequent Holding</u>	<u>Irrelevant by Court</u>	2008 WL 2752284
604 F.3d 197	536 F.3d 776	174 Cal. App. 4th 1313
637 F. Supp. 2d 392	576 F.3d 1	39 So. 3d 1172
2008 WL 4414719	603 F.3d 1127	267 S.W.3d 228
2008 WL 4936489	540 F.3d 231	<u>Consequential Invocation</u>
2009 WL 250278	586 F.3d 1289	<u>of Distinction</u>
728 F. Supp. 2d 702	595 F.3d 565	627 F.3d 622
2009 WL 799442	534 F.3d 1338	561 F.3d 816
2009 WL 2848670	330 Fed. App'x 16	382 Fed. App'x 58
2009 WL 2987183	576 F.3d 84	550 F.3d 465
724 F. Supp. 2d 132	515 F.3d 272	2008 WL 4426345
2008 WL 2397588	2010 WL 973375	603 F. Supp. 2d 1275
2009 WL 3049321	596 F. Supp. 2d 74	2009 WL 185941
645 F. Supp. 2d 381	2008 WL 2184117	2009 WL 841139
2008 WL 4346784	2009 WL 1118782	2009 WL 2219258
687 F. Supp. 2d 133	628 F. Supp. 2d 1152	2009 WL 1076279
2009 WL 734091	2010 WL 2666950	2009 WL 1574465
197 P.3d 562	730 F. Supp. 2d 624	325 S.W.3d 752
2010 WL 2196910	2008 WL 2132530	787 N.W.2d 96
683 S.E.2d 818	2010 WL 1732551	261 S.W.3d 111
2009 WL 3644922	34 So. 3d 183	246 S.W.3d 374
<u>Dicta</u>	2010 WL 2135356	169 Cal. App. 4th 41
<u>Nondirective</u>	997 So. 2d 605	282 S.W.3d 331
2010 WL 357933	2009 WL 3518211	
595 F.3d 411		
275 Fed. App'x 588		